92-1169

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THE EASTERN COMPANY, THE EASTERN CO. PENSION PLAN FOR HOURLY-RATED EMPLOYEES OF THE PATTIN MANUFACTURING COMPANY DIVISION, AND BANK OF BOSTON, CONNECTICUT (FORMERLY THE COLONIAL BANK),

Petitioners,

vs.

CARL RINARD, *ET AL.*, AND A CLASS OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the federal common law of ERISA, what language sufficiently incorporates standard pension plan documents like trust agreements so that they are considered part of the pension "plan"?

2. Is the requirement in § 4044(d)(1)(C) of ERISA [29 U.S.C. § 1344(d)(1)(C)], that a reversion of surplus assets to the employer must be set forth in "the plan," satisfied where such a possibility is unequivocally stated in the trust agreement although not in the main plan document?

LIST OF PARTIES

Petitioners are The Eastern Company, a publicly traded company headquartered in Naugatuck, Connecticut, and nominally the Eastern Company Pension Plan for Hourly-Rated Employees of the Pattin Manufacturing Company Division (the "Plan"), and the Plan trustee the Bank of BostonCorporation, through its subsidiary the Bank of Boston, Connecticut which was formerly The Colonial Bank. Pattin Manufacturing Company was, until its assets were sold in 1987, a wholly owned, unincorporated division of The Eastern Company.

Respondents are four named individuals formerly employed by Eastern's Pattin plant (Carl Rinard, Charles LaFaber, Giles Chancellor and Larry Powell), together with a Civil Rule 23(b)(2) Class which the District Court certified to include former employees who have a vested interest in receiving benefits under the Plan and any surviving spouses of those employees.[1]

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1. Respondents' Notice of Appeal to the United States Court of Appeals for the Sixth Circuit identified the following class members by name: Paul Antill, Charles Ayers, Leslie Ayers, Lewis Ayers, Richard Baker, William Baker, Bernard Bay (surviving spouse, Marva Bay), Robert Casto, Bernard Cleveland, Charles Cleveland, Leonard Dennis, Boley Downer, Robert Dye, Victor Dye, Patrick Engle, Herbert Farley, Gerald Felton, William Fox, William D. Fox, Jack Francis, Ernest Giffin, Blaine Harris (surviving spouse Dorothy Harris), Marvin Harris (surviving spouse Beryl Harris), Robert Harris, Harry Gray, Sidney Hill, Dale Holiday, Roger Holiday, Jack Hollister, Karl Lamb, Carl Lauer, Dale Leister, Alonzo Love, Steve Lowers, Robert Maxon, James Myers, Herbert Nazelrod (surviving spouse Martha Nazelrod), Richard Poole, Donnie Richards, Ottmas Richards, Raymond Ruble, Dale Schau, Leo Schrader, Ralph Shumar, Charles Siders, Rusell Siders, Glenn Smith, Harold Smith, Robert Stark, Robert Stauch, Fred Taylor, Charles Traux, Roger Traux, Larry Truax, Victor Vandall, Robert Warne, Howard Williams, Jr., Walter Winland, Howard Wright, Jr., and Robert Wright.

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Petitioners,

vs.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case October 28, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 978 F.2d 265, 15 Employee Benefits Cas. (BNA) 2708 (6th Cir. 1992). It is summarized at 61 U.S.L.W. 2299 (Nov. 17, 1992) and 19 Pension Rptr. (BNA) 1968, and is reprinted in Appendix A to this petition. (1a). The opinion ofthe United States District Court is reported at 769 F. Supp. 1416, 14 Employee Benefits Cas. (BNA) 1487 (S.D. Ohio 1991). It is summarized at 18 Pension Rptr. (BNA) 1595, and is reprinted in Appendix B. (10a).

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals [for which jurisdiction is invoked under 28 U. S.C. § 1254(1)], was rendered October 28, 1992.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1002:

> **(3)** The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. § 1102:

> **Establishment of plan**
>
> **(a) Named fiduciaries**
>
> **(1)** Every employee benefit plan shall be established and maintained pursuant to a

written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

29 U.S.C. § 1103:

Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that —

* * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2),

(3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 (as in effect on January 1, 1991) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

* * *

(d) Termination of plan

(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

29 U.S.C. § 1344:

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual

assets of a single employer plan may be distributed to the employer if–

> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (B) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.

26 U.S.C. § 401(a):

> **Qualified pension, profit-sharing, and stock bonus plan**
>
> **(a) Requirements for qualification.** A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section —
>
> * * *

STATEMENT OF THE CASE

A. Procedural History

This action concerns the entitlement to surplus assets remaining upon termination of a pension plan. The Plan covered former employees of The Eastern Company's ("Eastern")

unincorporated Pattin Manufacturing Company division, headquartered in Marietta, Ohio ("Pattin"). Following sale of the assets of its Pattin division in 1987, Eastern secured all vested benefits due former employees under the Plan. After doing so a surplus remained. Claiming their entitlement to the surplus funds, four individuals on behalf of a class of former employees or their surviving spouses brought suit in late 1989, pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* The action named Eastern, the Plan, and The Colonial Bank, of Waterbury, Connecticut (now the Bank of Boston, Connecticut) trustee of the pension fund.

Class action status for a portion of the case, pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, was not opposed by Petitioners, and that status was granted by the District Court. Thereafter, following discovery and extensive briefing, cross-motions for summary judgment were resolved in favor of Petitioners by United States District Judge James L. Graham. *Rinard v. The Eastern Co.*, 769 F. Supp. 1416 (S.D. Ohio 1991).

The United States Court of Appeals for the Sixth Circuit reversed, and remanded the case for further proceedings. 978 F.2d 265 (6th Cir. 1992). An Order pursuant to Rule 41(b), Federal Rules of Appellate Procedure, was issued by the Sixth Circuit on December 8, 1992 staying issuance of the mandate pending this application for a writ of certiorari.

B. Statement of Facts

Pattin was for many years a manufacturer of metal devices called mine roof bolts, used to support the interior sections of underground coal mines. Pattin began a pension plan in 1957, which it fully funded as the employer. In 1966, Pattin was organized by the United Steelworkers of America, AFL-CIO ("Steelworkers"). After Pattin was sold by Eastern in 1987, and

having assured that all pension benefits due its former employees would be provided consistent with Pattin's defined benefit retirement plan, Eastern sought to recoup surplus assets left in its Plan.

Neither the District Court nor the Court of Appeals discerned any genuine dispute of material fact which precluded resolution of the case on summary judgment.

1. The Origin of Eastern's Plan and Trust Agreement.

Eastern adopted a pension plan for its Pattin division in 1957. As the District Court found, this was a "defined benefit" plan. (23a-24a; 769 F. Supp. at 1425.) For many years after it was established *both* the main plan document and the separate, but related, Trust Agreement with the bank expressly provided that upon termination any surplus assets would revert to Eastern.

Concurrent with the creation of Pattin's plan in 1957, a pre-existing Trust Agreement between Eastern and The Hanover Bank was amended. This permitted Eastern to deposit Plan funds into its existing bank Trust. The Trust Agreement, though subsequently amended in other respects, expressly has stated at all times since 1957 that any surplus assets would revert to Eastern upon termination of the Plan.

2. Modification of Plan Documents After ERISA.

In the mid-1970's, the Plan document and Trust Agreement were both restated to reflect a change of trustee and, more importantly, to comply with ERISA. Andrew Toth, a man thoroughly trained in ERISA and employed at the Steelworkers headquarters in Pittsburgh, worked with Pattin to assist in implementing such changes. Mr. Toth had also worked with other companies on behalf of the Steelworkers, assisting in

modernization of pension plan paperwork. Mr. Toth termed his work "Erisafication."

When "Erisafication" began there remained essentially duplicative provisions addressing the reversion of surplus funds in both the main plan document for Pattin and in Eastern's bank Trust Agreement. Section 9 of the 1957 Version of the Plan had addressed reversion of surplus assets upon plan "termination."[2] This section inexplicably was deleted from the main plan document during "Erisafication." As District Judge Graham recognized, this provision was not in violation of ERISA, "but rather would have been permissible under § 1 344(d)(1)." (17a; 769 F. Supp. at 1423). Despite the fact that Mr. Toth of the Steelworkers personally worked with Eastern and had gone through the old 1957 Pattin document "almost . . . line-by-line, section-by-section," when deposed during pretrial discovery Mr. Toth could not recall any intentional reason for deleting Section 9 of Pattin's original 1957 Plan. "[N]o evidence" before the District Court "indicate[d] that this change was intentional on the part of Eastern or the union," or "indicate[d] an intent that the trust document, which still contained a reversion provision, be disregarded." (16a- 17a; 769 F. Supp. at 1422.)

Following "Erisafication," Article 17 ofthe main document continued to address, in general, the subject of plan "termination." Section 17.3 of the post-ERISA Plan stated:

> *Effect of Termination.* Upon termination or

---

2. Section 9 of the 1957 Version of the Plan provided that:

> any funds not rcquircd to satisfy all liabilities of thc Plan for pensions because of erroneous actuarial computations shall be returned to the company.

(13a; 769 F. Supp. at 1421).

> partial termination of the Plan, the rights of all Employees to benefits accrued to the date of such termination or partial termination to the extent then funded . . . shall be nonforfeitable, and upon the occurrence of such event, the assets of the Fund shall be allocated among the Members and their Beneficiaries in accordance with Section 4044(a) of ERISA and administered and distributed at such time or times as is determined by the Administrator.

22a; 769 F. Supp. at 1425. Thus, while the updated main plan document thereby explicitly addressed the allocation of Plan assets to the extent that it incorporated Section 4044(a) of ERISA [29 U.S.C. § 1344(a)], the main plan document no longer expressly addressed the disposal of any surplus assets remaining after all vested benefits had been satisfied. However, the Trust Agreement continued to provide explicitly for reversion of such surplus assets to Eastern.

Thus, Section 12.2(d)(i) of the 1975 Trust Agreement stated, in pertinent part:

> In the case of the termination of the Plan, . . . *any residual assets of the Plan may be distributed to the company* . . . if all liabilities of the Plan to participants and their beneficiaries have been satisfied and the distribution does not contravene any provision of law.

14a; 769 F. Supp. 1421 (emphasis added).

Both of the lower courts recognized the key issue was whether the Trust Agreement was a "plan" document which satisfied the

statutory requirement that "the plan provide[] for such a distribution [of surplus assets to the employer] . . . ." 29 U. S.C. § 1344(d)(1)(C). In determining that the Trust Agreement was incorporated by reference, District Judge Graham recognized that even after "Erisafication" the main plan document was replete with references to both the Trust Agreement and the Trust. (15a; 769 F. Supp. at 1422). Section 18.1 was one noteworthy section of the main plan document. Section 18.1 provided that, in determining a participant's benefits, one must look to the Trust Agreement, since it stated that Eastern's contributions were being

> held in trust by the Trustee for the exclusive benefit of the Members or their Beneficiaries under the Plan *who may, in accordance with the terms of . . . such Agreement of Trust, be entitled to participation thereunder.* (Emphasis added).

The main plan document contained numerous other references to the Trust or to the Trust Agreement. (15a; 769 F. Supp. at 1422). For instance:

> § 2. 17
>
> *Fund* or *Trust Fund* shall mean the total of contributions made by the Company to the Trust pursuant to the plan. . . . Trust Fund includes all assets acquired by investment and reinvestment which are held in the Trust by the Trustee.
>
> § 2.30
>
> *Trust* shall mean the legal entity resulting from the Trust Agreement between the Company and

> the Trustee who receives the Company contributions, and holds, invests and disburses funds to and for the benefit of Members and their Beneficiaries. (Emphasis in original.)
>
> § 12.1(a)
>
> The interest of any Member or Beneficiary in the Trust Fund or right to any payment under the plan or Trust . . . .

There was no dispute that Mr. Toth of the Steelworkers had thoroughly reviewed the main plan document during his "Erisafication" work. The District Court recognized that it was uncertain whether the Trust Agreement had been shown to Mr. Toth during "Erisafication," but it concluded that Respondents "produced no evidence that any request to receive specifically a copy ofthe trust agreement was not honored by Eastern." (18a; 769 F. Supp. at 1423). In addition, the District Court found, "no evidence that Eastern tried to conceal the trust agreement, or that Eastern did not consider the trust agreement to be relevant to the Plan." *Id.* In fact, a published "notice to employees" found in the Steelworkers' files from the 1977-1980 period explicitly advertised that a "copy of the Plan and related Trust Agreement" was available for inspection and copying. (17a; 769 F. Supp. at 1422). The Court of Appeals did not disagree with any of these factual conclusions.

3. The Summary Plan Description.

Eastern distributed a Summary Plan Description to its employees describing the essentials of Pattin's Plan. One version was published in 1978. It was updated in 1984. Both were published subsequent to the "Erisafication" work of Mr. Toth of the Steelworkers.

Under the subheading "The Plan Document," on page 19 of the Summary Plan Description, Pattin employees were informed that what they were reading was a summary which might not answer all their questions. Thus, "the actual document" comprising Eastern's full "plan" for Pattin was available for inspection. Employees were then also told: "Copies of this *and other Plan documents* are available for a reasonable charge upon written request" to Eastern. (18a; 769 F. Supp. at 1423) (emphasis added). The same page of the Summary Plan Description also noted that this was a "Defined Benefit Pension" plan, which was "Trusteed," and that the Trustee was "Colonial Bank & Trust Co. in Waterbury, Ct. "

Another section of the Summary Plan Description addressed a series of questions under the heading entitled "Plan Cost and Funding." It advised Pattin employees that there was an independent Trustee arrangement; and that annual contributions were determined by an "independent actuary" who "determines amounts to be contributed for the systematic building up of funds . . . ." Employees also were told "[a]mounts contributed by the Company are paid to the Trustee" who "in turn invests these funds and is responsible for making pension payments . . . . " It seems self evident that any employee reading Pattin's Summary Plan Description could anticipate that excess funds might be accumulated through an unduly conservative prediction of future costs by the independent actuary; that a separate Trust Agreement must necessarily exist; and that some provision addressing the disposition of any "surplus" assets resulting might be found in that Trust Agreement.

REASONS FOR GRANTING THE WRIT

I.

SUMMARY

This case can be viewed in one of two ways. Seen broadly, this is a case about the proper use of the doctrine of incorporation by reference under the federal common law of ERISA. Seen more narrowly, this is a case about the meaning of the word "plan" in Section 4044(d)(1)(C) of ERISA [29 U.S.C. § 1344(d)(1)(C)], and whether the Trust Agreement which accompanies each pension program is part of the "plan." Although ERISA defines "plan," it does so in a manner which is not helpful to understanding the use of the word in Section 4044(d)(1)(C).

No matter which analysis of this case is used, the resolution of this case by the Sixth Circuit conflicts directly with the resolution of the same questions in the Ninth Circuit. The Opinion below explicitly acknowledged this conflict. (6a-8a; 978 F.2d at 268-69). No matter how this case is framed, it is an important one in the developing federal common law of ERISA, and presents questions not yet addressed by this Court.

The detailed analysis given this case by District Judge Graham simplifies resolving these legal questions. The facts are clearly set forth. No dispute with the recitation of facts by the District Judge is apparent in the Court of Appeals' Opinion.

Regrettably the thorough analysis of the District Judge, like the direct precedent in the Ninth Circuit, was rejected by the Sixth Circuit primarily on the authority of a short passage on the "incorporation by reference" doctrine in *Corpus Juris Secundum.* (8a; 978 F.2d at 269 n.3.) That is indeed a slender reed upon which to rest any precedent setting decision, particularly one addressing a recurring question having broad significance in the federal common law of ERISA.

There is broad acceptance that the doctrine of incorporation by reference applies to the interpretation of pension documents under ERISA, particularly in respect of trust agreements. Indeed, this Court's unanimous Opinion in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), proceeded on the premise that collective bargaining agreements "incorporated the terms of the two trust agreements by reference." 466 U.S. at 369. *See also, Mead Corp. v. Tilley*, 490 U.S. 714, 728 n.1 (Stevens, J., dissenting) ("For example, if 1,000 employees are covered by a trust forming part of a pension plan . . . ."). Published opinions by other courts demonstrate that, as often as not, the application of this settled contract-based legal doctrine works in favor of employees and will not always favor employers. However, this Court has not yet squarely addressed the incorporation by reference doctrine in any ERISA case. Because of the decision below, as the law stands now in the Sixth Circuit this practical rule of document interpretation has been rigidified in a way which truly will breed difficulty in resolving future ERISA cases. Just how much "specificity" is possible or desirable before the doctrine of incorporation by reference is to be applied to key pension documents like a trust agreement should be addressed and settled by this Court.

Looking at this case as one merely concerned with the proper construction of ERISA's plan termination clause in § 4044(d)(1)(C) [29 U.S.C. § 1344(d)(1)(C)], there is still a square split in the circuits. Further examination in other lower courts is unlikely to bring enlightenment to the issue. Published reports suggest that allocation of surplus assets upon plan termination may well continue to be an issue of national economic significance, since many major employers stand to potentially recover

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3. "From 1980 to 1986, over 1,220 plans with 1.4 million participants have been terminated with reversions to sponsoring employers totaling over $12 billion. based on 1980 annual financial report data, almost 2,500 pension plans

(Cont'd)

substantial assets if plans are terminated.[3] Resolution of this case on the merits would avoid the uncertainty about the meaning of § 4044(d)(1)(C) left by the diametrically opposing positions of the Sixth and Ninth Circuit decisions.

Finally, this Court's resolution of this case will have strong public policy implications. Employers should be encouraged to be generous in funding their plans. Permitting later recovery of "surplus assets" gives employers an incentive to be generous up front. The District Court and other published court opinions recognized this policy. (27a; 769 F. Supp. at 1427). A miserly application of the "incorporation by reference" doctrine, or a narrow view of the word "plan" used in § 4044(d)(1)(C) will cause employers to be less generous. That the Congress did not make recovery of "surplus assets" illegal when it enacted ERISA was, no doubt, in practical recognition that the solvency of the private pension network in this country must be strongly encouraged. The Sixth Circuit decision undermines that important public policy. Moreover, the Third Circuit decision announced November 30, 1992 in *International Union of Electronic, Electric, Salaried, Machine and Furniture Workers v. Murata Erie North America, Inc.*, 1992 U.S. App. Lexis 31287, 1992 WL 347240, reversing one of the two precedents directly relied upon by the Sixth Circuit opinion here seems to evidence a conflict over the true ERISA "policy" on reversion of surplus benefits. Unlike the Sixth Circuit, Circuit Judge Becker recognized no "presumption against any

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(Cont'd)

would have excess assets of over $1 million if they were terminated. Plans of two-thirds of the top Fortune 100 companies would have at least some excess assets if they were terminated. IBM is said to have a potential reversion of $3 billion if it ever terminated its plan. And Exxon, United Air Lines, and Phillips Petroleum are at the time of this writing in the process of terminating plans to take back well over $1 billion, $962 million, and $400 million in excess assets, respectively." S. Bruce, *Pension Claims: Rights and Obligations* 608 (1988) (footnotes omitted).

reversion." (7a; 978 F.2d at 268). To the contrary, he wrote:

> Because of the strong policy concern that employers not be encouraged to underfund defined benefit plans [citation omitted] the language purporting to prohibit reversion to the employer of excess funds in a defined benefits plan must be quite explicit.

1992 U.S. App. Lexis at 44; 1992 WL 347240, at 13.

There is, as well, injustice readily apparent in the decision below. After employees receive every penny of their defined benefits, they ought not to also claim all of the surplus accumulated in a plan. A surplus arising through generous funding by an employer using conservative actuarial assumptions should, in fairness, be returned to the employer. After all, the employer ultimately must make up any shortfall in order to pay the "defined benefits" promised. *Mead Corp. v. Tilley,* 490 U.S. at 718, *citing* ERISA § 4062.

For all of these reasons this Court should grant the writ and examine this case on the merits.

II.

THE CONFLICT BETWEEN CIRCUITS

Schuck v. Gilmore Steel Corp., 784 F.2d 947 (9th Cir. 1986), addressed precisely the same two issues presented here. It resolved both in the opposite way from the Sixth Circuit, as is explicitly noted in the two lower court opinions in this case.

Schuck held that even though "the Pension Agreement does not name the Trust Agreement" and "does not refer to the Trust

Agreement by name, it clearly does incorporate whatever trust provisions the company decided to establish from time to time." 784 F.2d at 951. Thus, "[s]uch [incorporated] provisions include reversion of excess funds" and "the plan does provide for distribution of residual assets as required by section 1344(d)(1)(C)." *Id.* Interestingly, given the references in Eastern's Summary Plan Description to its Trust and to the Trustee, and given the far more direct references to the Trust Agreement in the Pattin plan document, the conclusion that the Trust and Trust Agreement were incorporated by reference ought to have been done more easily here than in *Schuck*. As noted above, a number of such references to the Trust and Trust Agreement are set out in the District Court opinion. (15a; 769 F. Supp. at 1422).

The Sixth Circuit obviously concluded that something more was required to incorporate the Trust Agreement. In reaching this conclusion it discovered what it termed a statutory "presumption against any reversion." (7a; 978 F.2d at 268). However, no previously reported case had found any such "presumption" in ERISA. To the contrary, a number of published decisions had affirmatively recognized that public policy favored allowing reversion of any surplus to the employer. This was permitted in the common law of trusts, and has been approved in a number of cases decided under ERISA.

The Sixth Circuit claimed primary support for its holding in *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991). However, the plan documents in the *Wisconsin Porcelain Co.* case were vastly different than those here. Nowhere in *either* the main plan document *or* in the trust agreement had a *"properly enacted"* provision been included which allowed reversion of any surplus to the employer. 947 F.2d at 254 (emphasis in original). The Seventh Circuit case recognized the illegality of a 1976 plan amendment agreed to by only six of more than twenty members of a partnership, because "there is no

indication that *all* partners delegated authority to amend the plan to the managing partners." *Id.* at 256 (emphasis in original.) Hence, the Seventh Circuit was called upon to address a novel argument not presented here, namely that there was some sort of implied right to reversion of the surplus once liabilities were satisfied. This novel argument was rejected. However, it was only this latter argument, which ignored § 4044 of ERISA, that prompted the court's concluding comment (relied upon by the Sixth Circuit opinion), that "unless the plan specifically provides for reversion to the employer, surplus assets go to beneficiaries and participants." *Id.*

The passage from *Wisconsin Porcelain Co.* relied upon was thus a superficial conclusory statement at the end of an opinion addressing a case in which no document—plan or trust—allowed reversion of surplus assets to the employer. The decision offers no genuine support for the Sixth Circuit's decision here. The Ninth Circuit decision in *Schuck, supra,* was not mentioned by the Seventh Circuit, further demonstrating that *Wisconsin Porcelain Co.* addressed substantially different facts. The Sixth Circuit's reliance upon *International Union of Electronic, Electric, Salaried, Machine and Furniture Workers v. Murata Erie North America, Inc.*, 772 F. Supp. 870, 872 (W.D. Pa. 1991), *rev'd*, 1992 U.S. App. LEXIS 31287 (3d Cir. Nov. 30, 1992) (Becker, J.), similarly is misplaced. There, as in the *Wisconsin Porcelain Co.* case, plan documents both as originally drafted and following their "Erisafication" with union approval in 1977 and 1978 never provided for a reversion of surplus plan assets.

III.

THE DECISION BELOW RADICALLY ALTERS COMMON UNDERSTANDING OF ERISA LAW.

As noted *supra*, even opinions by this Court have proceeded

from the assumption that the trust agreement customarily found in private pension documentation is part of the ERISA "plan."

Broad, albeit generally tacit acceptance has been given to the proposition that trust agreements or even other documents constitute "plan" documents under ERISA. *See, e.g, Mead Corp. v. Tilley,* 490 U.S. at 728 n.1 (Stevens, J., dissenting); *Moore v. Metropolitan Life Ins. Co.,* 856 F.2d 488, 492 (2d Cir. 1988) ("Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans."); *In re Gulf Pension Litigation,* 764 F. Supp. 1149, 1189 (S.D. Tex. 1991). This conclusion that various documents constitute the "plan" is both practical and is consistent with the statutory language used by Congress in ERISA.

The Sixth Circuit opinion in this case agreed with the premise that an ERISA "plan" need not be set forth in one single document. Neither the statutory language, ERISA § 402 [29 U.S.C. § 1102(a)(1)], nor any other legal requirement dictates that a single document be used. Given the scope and complexity of documentation ordinarily required to operate a pension plan, any such "single document" requirement would be wooden indeed. It might enrich a segment of the bar, but it would assist neither employers nor employees. The Sixth Circuit was therefore correct in recognizing that no "single document" must constitute an ERISA "plan." (6a; 978 F.2d at 268 n.2). *See also, Horn v. Berdon, Inc. Defined Ben. Pension Plan,* 938 F.2d 125, 127 (9th Cir. 1991); *Myron v. Trust Company Bank Long Term Disability Ben. Plan,* 522 F. Supp. 511, 519 (N.D. Ga. 1981), *cert. denied,* 462 U.S. 1119 (1983).

Just as multiple documents may constitute a "plan," consistent with the statutory language of ERISA, so ERISA contemplates that most pension plans will be held in trust pursuant to a separate trust agreement. ERISA § 403(a) [29 U.S.C. § 1103(a)], provides that

most pension plans "shall be held in trust by one or more trustees," who "shall be either named in the trust instrument or in the plan instrument. . . ." Consistent with this reference in ERISA to a separate trust instrument, the Internal Revenue Code views the trust agreement customarily created to administer a pension plan as a part of the "plan." I.R.C. § 401(a) ("A Trust created or organized in the United States and forming part of a . . . pension . . . plan of an employer for the exclusive benefit of his employees or their beneficiaries . . . .").

Given these two premises, the decision below seems plainly inappropriate. On the other hand, incorporating by reference the terms of a trust agreement to supplement provisions in the main plan document, as was done in *Schuck*, is totally consistent with the notion that a "plan" need not be one single document, and is consistent with the importance of a trust agreement in the overall scheme of things.

Santa Monica Culinary Welfare Fund v. Miramar Hotel Corp., 920 F.2d 1491 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2855 (1991), is a noteworthy example of a case in which incorporating a trust agreement by reference affirmatively benefited employees, and served other public policies articulated in ERISA. That decision held:

> Here, the Trust Agreement establishing the Fund contemplates that employers who contribute to the Fund are bound by the terms of the Trust Agreement.
>
> * * *
>
> While Miramar is not a signatory to the Trust Agreement, . . . Miramar's employees are participants in the Fund, [and] then it

> necessarily follows that Miramar is an employer under the Trust Agreement. Miramar cannot have it both ways.

920 F.2d at 1493-94. Because the trust agreement in *Miramar Hotel Corp.* afforded the right to audit any contributing employer's books and records, the Ninth Circuit held the Fund had the right to audit Miramar's payroll records even though the Miramar Hotel had not signed the trust agreement. In thus deciding the matter, *Miramar Hotel Corp.* relied upon several decisions of this Court which had previously recognized the important role trustees are given under ERISA, specifically *Central States Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570-72 (1985); and *NLRB v. Amax Coal Co.*, 453 U.S. 322, 332-34 (1981). The Sixth Circuit's wooden decision in this case undermines the importance of the trust arrangement, and in future cases can deny employees key protections ERISA intended for pension rights.

IV.

THE INCORPORATION BY REFERENCE DOCTRINE

The common law has long recognized that in "cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement . . . ." *Guerini Stone Co. v. P. J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916); 17a Am. Jur. 2d *Contracts* § 388 (1991); 17A C.J.S. *Contracts* § 298-99 (1961). It is customarily said that even where the parties to the various writings are not the same, if the several instruments were known to everyone and all address the same subject matter they ought to be construed together. Hence, the fact that the Steelworkers were not a "party" to the Trust Agreement between Eastern and its bank is immaterial so long as the plan gave notice of the Trust Agreement and "incorporated" it sufficiently.

The Sixth Circuit relied on a statement in 17A C.J.S. *Contracts* § 299 that "the reference must be clear and unequivocal." This statement is based on general language in a 1947 state appellate court decision from California, based on facts wholly unlike those here. The case, *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.*, 81 Cal. App. 2d 437, 184 P.2d 183 (1947), addressed the limitation of liability of a warehouse for pears lost while in storage. The limitation of liability language was not known to plaintiff and "his attention was not directed to the incorporated document." 184 P.2d at 190. That is, as District Judge Graham recognized, manifestly not true here.

That the "incorporation by reference" doctrine has none of the "wooden" requirements required by the decision below seems evident from an examination of both Section 298 ("Separate Writings") and Section 299 ("Papers Annexed or Referred to") in *Corpus Juris Secundum.* The same is true by examining the comparable articles in *American Jurisprudence* 2d, *supra.* Moreover in this area of the law the trend is away from any "wooden" rule mechanically applied.

Judge Fuld's landmark opinion in *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E. 2d 551, 553 (1953), addressed, for statute of frauds purposes, the question "what constitutes a sufficient connection" between documents. The court recognized the "positionwhich has gained increasing support over the years is that a sufficient connection between the papers is established simply by a reference in them to the same subject matter or transaction." 110 N.E. 2d at 553. Hence, Judge Fuld observed, "[t]he statute is not pressed 'to the extreme of a literal and rigid logic' and oral testimony is admitted to . . . establish the acquiescence, of the party to be charged, to the contents of the one unsigned." 110 N.E.2d at 554 (citations omitted). The *Restatement (Second) of Contracts* § 132 (1981) adopted the view taken by Judge Fuld's opinion. Reporter's Note following § 132. This

common sense view ought to be the common law of ERISA.

Although not as squarely on point as the *Schuck* case, several other ERISA decisions have reviewed the reversion of surplus funds issue and, in doing so, have given effect to trust agreements. None required "clear and unequivocal" incorporation by reference. For instance, *Outzen v. FDIC ex rel. State Examiner of Banks*, 948 F.2d 1184 (10th Cir. 1991), addressed a reversion of funds claimed by the FDIC after a bank became insolvent. Consistent with *Schuck* and the District Court here, the Tenth Circuit found reversion of the surplus appropriate based upon "the provisions of the Plan, construed with the Trust Agreement and in light of the policies of ERISA." 948 F.2d at 1185 . *See also, In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1188-91 (S.D. Tex. 1991) (construing plan, Agreement of Trust, the common law of trusts, and "the policies underlying ERISA" in allowing employer to obtain a reversion of a surplus). Against this background of the statutory framework under ERISA and frequent, practical utilization of trust agreements to supplement main plan documents, it was manifestly unreasonable for the Sixth Circuit to impose a new, difficult legal standard before Eastern's Trust Agreement could be "incorporated" on the point at issue here.

The common law of Trusts is frequently consulted to understand ERISA. *E.g., Central States v. Central Transport, Inc.*, 472 U.S. at 570; *NLRB v. Amax Coal Co.*, 453 U.S. at 329-30; *see also, Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992). The reversion of any surplus remaining to the settlor of a trust had been permitted at common law. *In re Gulf Pension Litigation*, 764 F. Supp. at 1188-89. Moreover, the "incorporation by reference" doctrine set forth in the *Restatement (Second) of Contracts* § 202(2) (1981) that "all writings that are part of the same transaction are interpreted together" is applied to trusts. The *Restatement (Second) of Trusts* § 48 (1959) adopted the rule that a trust may be evidenced by several documents, so long as they relate to the same transaction.

Against this background, the decision of the Sixth Circuit must be viewed with alarm. If left unreviewed, it will mark a dramatic rejection of key common law concepts which have worked well in deciding common law cases and in deciding cases under ERISA.

V.

THE PUBLIC POLICY IMPLICATIONS

Quoting an earlier decision on this subject, District Judge Graham recognized that

> [p]articipants benefit more from a policy that encourages employers to fund pension plans generously than from a policy that entitles plan participants to surplus assets and thereby discourages employers from potentially excessive funding

27a; 769 F. Supp. at 1427. The Sixth Circuit disregarded the policy implications of its ruling in this case. The very practical policy of encouraging generous funding has been noted elsewhere. *See, e.g, International Union,* 1992 U.S. App. LEXIS 31287, 1992 WL 347240; *In re Gulf Pension Litigation,* 764 F. Supp. at 1184, and cases noted; Note, *Employer Recapture of ERISA Contributions Made By Mistake: A Federal Common Law Remedy to Prevent Unjust Enrichment,* 87 Mich. L. Rev. 2000, 2054-55 (1991).

The Sixth Circuit implicitly seems to have had in mind some concern for "an employee's 'expectations,"' as was also the situation in the Fourth Circuit decision reversed by this Court in *Nationwide Mutual Ins. Co. v. Darden,* 112 S. Ct. at 1350. As Justice Souter's Opinion in *Darden* made clear, this is "an approach infected with circularity and unable to furnish

predictable results." *Id.* Employees are no more entitled to win all the "close" cases under ERISA than are employers. Neutral legal principles fairly applied support a reversal of the Sixth Circuit decision herein, and such an outcome will best serve the most basic policy of ERISA which is to encourage the integrity and solvency of the private pension system.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

RICHARD A. FRYE
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Attorneys for Petitioners

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 28, 1992

No. 91-3853

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARL RINARD, and all others similarly situated,
Plaintiffs-Appellants,

v.

EASTERN COMPANY, EASTERN COMPANY PENSION PLAN FOR HOURLY-RATED EMPLOYEES OF THE PATTIN MANUFACTURING COMPANY DIVISION, THE COLONIAL BANK,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed October 28, 1992

Before: MILBURN and SUHRHEINRICH, Circuit Judges; and COHN, District Judge.*

COHN, District Judge.

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*Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

I.

This is a class action under the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1001, *et. seq.* Plaintiffs-Appellants (Rinard) are ninety three former employees or the surviving spouses of former employees of the Pattin Manufacturing Company Division (Pattin Division) of Defendant-Appellee Eastern Company (Eastern). Also Defendants-Appellees are the Eastern Company Pension Plan for Hourly-Rated Employees of the Pattin Manufacturing Company (Plan), established under the collective bargaining agreement between the United Steelworkers of America (Union) and Eastern, and The Colonial Bank (Colonial), the trustee named in the funding mechanism provision of the Plan. Rinard claims that Eastern breached the collective bargaining agreement and also violated ERISA by taking for itself the surplus monies in the Plan after the purchase of annuities for Rinard on the termination of operations of Eastern's Pattin Division. The District Court, concluding that the surplus monies belonged to Eastern, granted Eastern summary judgment. *Rinard v. Eastern Company*, 769 F. Supp. 1416 (S.D. Ohio 1991). This appeal followed.

II.

The Plan was unilaterally created in 1957, at a time when Eastern was non-unionized. The Plan as originally written provided for reversion of surplus assets to Eastern, stating, in relevant portion:

> The Plan may be terminated at any time by the Board of Directors, in which event all of the funds of the Plan after providing the expenses of the Plan shall be used for the benefit of covered employees and pensioners, and for no other purpose, except that any funds not required to satisfy all liabilities of the Plan for pensions because of erroneous actuarial computations shall be returned to the Company.

Appendix A

The Plan utilized a previously created Agreement and Indenture of Trust (Trust Agreement) signed in 1952 between the Eastern Malleable Iron Company (now The Eastern Company) and The Hanover Bank as a funding mechanism. Three pension plans covering various employees groups of Eastern were described in the Trust Agreement as utilizing it as a funding mechanism. The Trust Agreement provided:

> All amounts received by the Trustee from the Company under the Agreement shall constitute a single fund and may be comingled.

The Trust Agreement directed the Trustee to make payments from the funds held by the Trustee upon written demand of the retirement boards of the respective plans utilizing the Trust Agreement for funding. The Trust Agreement also provided that any surplus funds remaining on hand after satisfaction of the obligations of a particular Plan were to be returned to Eastern. Particularly, the Trust Agreement stated:

> The Company reserves the right, at any time and from time to time, by action of its Board of Directors, to modify or amend in whole or in part, any or all of the provisions of this agreement, provided that no such modification or amendment shall be effective until filed with the Trustee and until the Company certifies to the Trustee that such modification or amendment does not make it possible for any part of the corpus or income of the Fund to be used for or diverted to purposes other than the exclusive benefit of employees or their beneficiaries or the administrative expenses of the Plan and further certifies that there may be returned to the Company upon the termination of the Fund, only such amount as may, due to an erroneous actuarial computation, remain in the Fund after the satisfaction of or provision for all liabilities with respect to such employees or their beneficiaries; and provided further that no such

> modification or amendment which affects the rights, duties or responsibilities of the Trustee may be made without its consent.

The Trust Agreement was amended in 1975 by an Amendatory Agreement signed by Eastern and Colonial, as successor trustee to The Hanover Bank. Neither the United Steelworkers, who by that time had become collective bargaining agent for the hourly-rated employees of the Pattin Division, nor the Retirement Board for the Plan signed the Amendatory Agreement. By 1975, six pension plans covering various employee groups of Eastern, including the hourly-rated employees of the Pattin Division, were identified in the Amendatory Agreement as using the Trust Agreement funding mechanism. Section 12.2 of the Amendatory Agreement contained the following provision relating to the return of surplus funds to Eastern:

> In the case of the termination of the Plan, and if, but only if, the Plan is a defined benefit plan, any residual assets of the Plan may be distributed to the Company at the direction of the Administrator (or of a trustee appointed upon the application of the Pension Benefit Guaranty Corporation) if all liabilities of the Plan to participants and their beneficiaries have been satisfied and the distribution does not contravene any provision of law. The certificate of an enrolled actuary engaged by the Administrator pursuant to the Employee Retirement Income Security Act of 1974 stating that there are residual assets of the Plan remaining in the Fund after all liabilities of the Plan to participants and their beneficiaries have been satisfied shall be conclusive evidence of that fact, but in its discretion the Trust may require other evidence of that fact.

The United Steelworkers began representing hourly-rated employees of the Pattin Division in 1966. After the enactment of ERISA, Eastern and the Union modified the

terms of the Plan to bring them into compliance with the terms of ERISA. The reversion provision of the Plan as originally written was not included in the "ERISAfied" Plan. The "ERISAfied" Plan became effective January 1, 1976.[1]

In 1987, Eastern sold its Pattin Division and terminated all of the division's employees. The trustee held Plan assets allocable to the Pattin Division in excess of the amount necessary to satisfy all vested employee pension rights. These rights were recognized through the purchase of annuities. Eastern claimed the surplus assets pursuant to the terms of the Amendatory Agreement. The Union claimed that the surplus was the property of the Plan and, therefore, should be distributed to the employees since neither the terms of the Plan nor ERISA allowed for its reversion to Eastern.

III.

A.

The distribution of surplus assets upon the termination of an ERISA plan is governed by 29 U.S.C. § 1344(d)(1), which provides:

> (1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if–
>
> > (A) All liabilities of the plan participants and their beneficiaries have been satisfied,
> >
> > (B) the distribution does not contravene any provision of law, and

---

[1]It is not disputed that the text of the Trust Agreement, either as originally executed or as amended, was not provided to the Union during the negotiation of the "ERISAfied" Plan. Rinard asserts that Eastern concealed the Trust Agreement. Eastern responds that the Union never requested the document. In either event, the terms of the Trust Agreement were not a subject of the negotiations.

(C) the plan provides for such a distribution in these circumstances.

That all liabilities to plan participants and beneficiaries have been satisfied from the assets of the Plan, § 1344(d)(1)(A), is not disputed. Rinard does not contend that the reversion of the surplus would contravene any provision of law. § 1344(d)(1) (B). The dispositive issue is whether the terms of the Trust Agreement as amended are incorporated by reference in the terms of the Plan[2] in satisfaction of § 1344(d)(1)(C).

B.

The District Court recognized that the terms of the "ERISAfied" Plan are silent on the reversion of any surplus and that there is "no language in the pension agreements specifically incorporating the terms of the trust agreement." 769 F. Supp. at 1422. The District Court reasoned, however, that the several references to a trust agreement contained in the Plan gave the employees "ample notice of the existence of the trust agreement and its role in the implementation of the Plan and the payment of benefits." *Id.* The District Court concluded that there is "sufficient reference to the trust in the Plan itself to incorporate the trust agreement as a plan document for the purposes of ERISA." *Id.*

The District Court in coming to its conclusion relied on *Schuck v. Gilmore Steel Corp.*, 784 F.2d 947 (9th Cir. 1986). In *Schuck*, a trust agreement provided that the surplus would revert to the employer. The pension agreement was silent on reversion of any surplus but

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[2]Rinard argues initially that incorporation of the terms of the Trust Agreement as amended into the terms of the Plan would violate the applicable regulations. 29 C.F.R. § 2618.1 *et.seq.* The District Court correctly observed that there is no requirement in the regulations that the terms of an ERISA plan be contained in single document. Nor does the requirement of 29 U.S.C. § 1102(a)(1), that the terms of an ERISA plan be contained in a written instrument, require that it be a single document.

referred to the creation of a trust to effectuate the pension plan. The Ninth Circuit, without pointing to any supporting authority or setting forth its reasoning, concluded that the trust agreement was incorporated into the pension plan in satisfaction of § 1344(d)(1)(C).

C.

1.

ERISA establishes a general requirement that plan assets be held in trust, 29 U.S.C. § 1103(a), (b), and creates a presumption that plan assets held under a trust agreement inure to the benefit of the employees. 29 U.S.C. § 1103(c). Section 1344(d)(1) sets out the conditions that must be met to overcome the presumption against any reversion. *See* text *supra*. These provisions, taken together, preclude reversion of surplus assets to an employer unless there is specific and affirmative compliance with the conditions of § 1344(d)(1)(C).

2.

The Court of Appeals for the Seventh Circuit, in *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991), reasoned that an amendatory provision purporting to confer reversionary rights on the employer "violates ERISA's prohibition of reversion to employers unless a plan provision, *properly enacted*, covers such a contingency. 29 U.S.C. §§ 1103(c)(1), 1344(d)(1)." 947 F.2d at 254 (original emphasis). The Seventh Circuit concluded that "unless the plan *specifically provides for reversion* to the employer, surplus assets go to the beneficiaries and participants. 29 U.S.C. § 1344(d)(1) (1988)." 947 F.2d at 256 (emphasis added). *See also International Union of Electronic, Electric, Salaried, Machine and Furniture Workers, AFL-CIO v. Murata Erie North America, Inc.*, 772 F. Supp. 870, 872 (W.D. Pa. 1991) (§ 1344(d) "requires employers to insert an affirmative provision if they seek reversion in favor of themselves.")

Appendix A

3.

The Plan did not specifically provide for the reversion of surplus assets to Eastern. Indeed, the reversion provision that existed in prior versions of the Plan was removed when the Plan was "ERISAfied." Given ERISA's clear presumption against reversion, we believe that the removal of the reversion provision reinforced the expectation of Plan participants and beneficiaries that any surplus would be distributed in the event of termination.

The Plan also failed to make any mention of incorporating the terms of the Trust Agreement.[3] In this context, the references in the Plan to a trust agreement are little more than a recognition of the existence of a trust and a restatement of the duty of the employer to segregate plan assets. 29 U.S.C. § 1103. We are of the opinion that the purposes of ERISA are contravened where the mere recognition of the duty and presumption created by § 1103 is treated as the equivalent of satisfying the requirements of the exception permitted under § 1344(d), as found by the District Court and in *Shuck*.

D.

There is no reversion provision in the Plan itself and no express provision for incorporating the terms of the Trust Agreement in any of the provisions of the Plan. In sum, there is just no specific and affirmative compliance with the conditions of § 1344(d)(1)(C). *Albedyll v. Wisconsin*

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[3]Notwithstanding the purposes of ERISA, the Plan references fall short of satisfying the specificity requirement of the general formulation of the doctrine of incorporation by reference:

> For the terms of another document to be incorporated by reference into the document executed by the parties, *the reference must be clear and unequivocal*, and must be called to the attention of the other party, he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.

17A Corpus Juris Secundum, *Contracts*, § 299 (emphasis added).

Appendix A

Porcelain Co. Revised Retirement Plan, 947 F.2d 246 (7th Cir. 1991). Accordingly, we find that the surplus belongs to Rinard and must be equitably distributed to the plaintiffs under the supervision of the District Court. Therefore, the decision of the District Court is REVERSED and the case REMANDED for further proceedings consistent with this opinion. We do not retain jurisdiction.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED AUGUST 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-89-1062
JUDGE GRAHAM

Carl Rinard, et al.

Plaintiffs,

vs.

The Eastern Company, et al.,

Defendants.

OPINION AND ORDER

The present action was commenced by plaintiffs, former employees of the Pattin Manufacturing Company Division of defendant Eastern Company, on December 28, 1989. The named defendants are the Eastern Company ("Eastern"), the Eastern Company Pension Plan for Hourly-Rated Employees of the Pattin Manufacturing Company Division (the "Plan") and Colonial Bank, a trustee of the Plan and holder of the funds which are the subject of this action. Counts One, Two and Three of the complaint allege violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

On October 22, 1990, this court granted plaintiffs leave to file

a first amended complaint, in which plaintiffs assert the additional claims of estoppel (Count Four), a violation of 29 U.S.C. §§ 1021(d) and 1344(d)(1)(B) under ERISA (Counts Five and Seven), and a violation of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (Count Six). This court also certified this action as a class action except in regard to Count Four and the damage claims for emotional distress asserted in paragraph six of the prayer.

This matter is now before the court on defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment. The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Appendix B

The record before the court reveals that the Plan was terminated following the closing of the Pattin Manufacturing Company plant in Marietta, Ohio. The funding of all of the pension benefits specified in the Plan was completely provided for through the purchase of annuities. Defendants estimate that after the purchase of these annuities, approximately $100,000 remained in the Plan's trust fund. The ultimate question presented by plaintiffs' first amended complaint is whether plaintiffs or defendant Eastern are entitled to these surplus funds.

The distribution of residual assets under ERISA is governed by the provisions of 29 U.S.C. § 1344(d)(1), which provides:

> (1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—
>
> > (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
> >
> > (B) the distribution does not contravene any provision of law, and
> >
> > (C) the plan provides for such a distribution in these circumstances.

Plaintiffs claim in Count One that the requirements of § 1344(d)(1)(C) have not been met, and that therefore distribution of the surplus to Eastern would violate ERISA. They assert in Count Two that the surplus should be paid to them as benefits. Defendants argue that the Plan does provide for distribution of the surplus to Eastern.

Appendix B

The documents before the court reveal that the pension plan for the hourly rated employees of Pattin Manufacturing dates back to 1957. Section 9 of the original version of the Plan (Toth Dep. Ex. 14) provided that

> any funds not required to satisfy all liabilities of the Plan for pensions because of erroneous actuarial computations shall be returned to the Company.

The Plan was funded by means of a trust agreement which had been in effect since 1952 between Eastern and Hanover Bank. (Defendants' Mot. Ex. 11). Paragraph 11 of the trust agreement provides that

> there may be returned to the Company upon the termination of the Fund, only such amount as may, due to an erroneous actuarial computation, remain in the Fund after the satisfaction of or provision for all liabilities with respect to such employees or their beneficiaries; ...

Section 7 of the original Plan provided that all funds of the Plan would be held by a trustee, and that Eastern would pay contributions to the trustee to fund employee pensions. In Section 8 of the original Plan, Eastern reserved the right to modify the terms of the Plan.

At some point in the 1960's, the United Steelworkers of America became the exclusive bargaining agent for the employees of Pattin Manufacturing.

Appendix B

Following the enactment of ERISA, Andrew Toth, a union representative, worked with Eastern to bring the Plan into compliance with ERISA. During that process, the language in Section 9 referring to reversion of surplus assets to Eastern was dropped from the Plan. Mr. Toth, when questioned about this section during his deposition, could not recall why this change was made. (Toth Dep., pp. 26-28).

In 1975, the 1952 trust agreement was amended to reflect an agreement between Eastern and the Colonial Bank and Trust Company as successor trustee. Section 12.2(d)(i) of the 1975 trust agreement provides in relevant part:

> In the case of the termination of the Plan, and if, but only if, the Plan is a defined benefit plan, any residual assets of the Plan may be distributed to the company at the direction of the administrator (or of a trustee appointed upon the application of the Pension Benefit Guaranty Corporation) if all liabilities of the Plan to participants and their beneficiaries have been satisfied and the distribution does not contravene any provision of law.

The post-ERISA version of the plan, effective January 1, 1976, was changed from time to time. It was not until October of 1978 that section 17.1 of the Plan, relating to Eastern's right to change the Plan terms, was amended to provide that the consent of the union was required for plan modifications. (Defendants' Reply Ex. 5).

Defendants argue that although the Plan itself does not provide for reversion of surplus assets to Eastern, the Plan in effect incorporates the trust agreement by reference. Defendants'

position is that the trust agreement should be considered a Plan document. Defendants rely on *Schuck v. Gilmore Steel Corp.*, 784 F.2d 947 (9th Cir. 1986). In *Schuck*, the trust agreement provided for a reversion of surplus to the company. The pension agreement authorized the company to establish a trust, but did not specifically identify the trust agreement. The court, *Id.* at 851, rejected the plaintiffs' argument that only the pension agreement should be referred to in analyzing compliance with § 1344(d)(1)(C), and found that the pension agreement incorporated the provisions of the trust agreement concerning reversion and satisfied the requirements of § 1344(d)(1)(C).

Here, the trust agreement authorizes the return of surplus assets to Eastern, whereas the pension agreement is silent on that point. There is no language in the pension agreement specifically incorporating the terms of the trust agreement. However, there are many references to the trust in the Plan. The terms "trust fund", "trust" and "trustee" are defined in Article 2 of the Plan. "Trust" is defined in Section 2.30 of the Plan as "the legal entity resulting from the Trust Agreement between the Company and the Trustee . . .", thereby recognizing the existence of a trust agreement. Under Article 11, Section 11.1 of the Plan, benefits are payable by the trustee directly to the employee. Section 15.9 of the Plan permits Eastern to delegate all or part of its responsibilities in the management, operation and administration of the Plan to the trustee. Under Section 16.1, the trustee, identified in Section 2.31 as the Colonial Bank and Trust Company, is designated a "named fiduciary" with respect to the control, management and disposition of trust assets. Section 16.2 provides for consultation between Eastern and the trustee concerning funding policy and method.

Article 18 of the Plan, Section 18.1, states, "In order to implement the Plan, the Company has entered into an agreement of

Trust. . . for the exclusive benefit of the Members or their Beneficiaries under the Plan who may, in accordance with the terms of the Plan *and such Agreement of Trust,* be entitled to participation thereunder." (Emphasis added) Section 19.5 provides that "It is the intention of the Company that the Plan, and the Trust established to implement the Plan, shall comply with [the Internal Revenue Code and ERISA] and the provisions of the Plan and Trust Agreement shall be construed to effectuate such intention." In light of the many references in the Plan to the trust agreement, including those set forth above, an employee would have ample notice of the existence of the trust agreement and its role in the implementation of the Plan and the payment of benefits.

Additionally, 29 U.S.C. § 1103(a) requires that all assets of an employee benefit plan be held in trust by one or more trustees unless the plan falls within one of the exceptions set forth in 29 U.S.C. § 1103(b), none of which are applicable here. The trust agreement in this case imposes fiduciary responsibilities upon the trustee which should be considered a part of the Plan for purposes of the enforcement provisions of ERISA. In light of the above circumstances, including the fact that Eastern was authorized by the Plan to establish a trust, the trust agreement will be considered a plan document. There is sufficient reference to the trust in the Plan itself to incorporate the trust agreement as a plan document for purposes of ERISA.

Plaintiffs point to a variety of factors which they claim indicate an intent on the part of the parties that the trust not be considered a part of the Plan. Plaintiffs note the fact that section 9 of the original Plan which allowed Eastern to claim the surplus was deleted when the Plan was revised following the enactment of ERISA. They assert that Eastern thereby waived any right to recover surplus funds. However, plaintiffs have presented no

evidence which would indicate that this change was intentional on the part of Eastern or the union and the employees, nor does this indicate an intent that the trust document, which still contained a reversion provision, be disregarded. The Plan, as amended, contained no provision specifically awarding the surplus to the employees or prohibiting reversion to the employer. Plaintiffs cite no provision in the applicable collective bargaining agreements which would preclude reversion of surplus assets to the employer. The reversion provision in the trust agreement existed at the time of the first collective bargaining agreement, and was in effect at the time the union gained the right to approve plan modifications. The union and employees were well advised by the terms of the Plan that the operation of the Plan was governed in part by the trust agreement. In fact, a notice to employees from the union files containing the dates "November 4, 1977 - November 5, 1980" indicated that a "copy of the Plan and related Trust Agreement" was available for inspection and copying. (Req. Admissions No. 29, Defendants' Reply Ex. 20).

Plaintiffs also argue that if the Plan was modified to comply with ERISA, the deletion of Section 9 from the Plan also had the effect of modifying the trust agreement by striking the reversion clause. This argument ignores the fact that Section 9 of the original plan would not have violated ERISA, but rather would have been permissible under § 1344(d)(1). Therefore, Section 9 could not have been deleted to bring the Plan into compliance with ERISA. Further, there is no evidence that, by removing Section 9 from the Plan, the parties also intended to remove the reversion clause from the trust agreement. In fact, the reversion clause was revised and retained in the 1975 version of the trust agreement. The Plan allowed Eastern to enter into the trust agreement, and the provision in the trust agreement need not be repeated in the Plan itself in order to be enforceable.

Appendix B

Plaintiffs rely on various memoranda by Eastern officials as indicating an intent that the "Plan" be confined to the terms of the Plan Agreement and that the employees would recover the surplus. However, the fact that these letters and memos, which address other matters, do not specifically refer to the trust agreement as being a part of the Plan does not indicate an intent that the trust be excluded from the Plan. These memos certainly indicate no intent that the surplus be distributed to the employees.

Plaintiffs also note that Eastern does not refer to the trust agreement in its filings with the Pension Benefit Guaranty Corporation. However, the forms do indicate the existence of a trust. Other filings by Eastern with the Internal Revenue Service indicate that the trust agreement does not prohibit reversion of surplus assets to the employer. (Defendants' Reply Ex. 9). The Plan summary, p. 19, advises employees that copies of the pension plan "and other Plan documents" are available.

Plaintiffs also refer to the deposition testimony of Mr. Donald Whitmore that he did not recall any employees who had been sent a copy of the trust agreement. Mr. Whitmore indicated that he did not send a copy of the trust agreement in response to requests for information because the trust agreement was referred to in the basic plan document. Plaintiffs have produced no evidence that any request to receive specifically a copy of the trust agreement was not honored by Eastern. In fact, defendants refer to statements by Mr. Toth and other union representatives to the effect that the union had no interest in the trust agreement. There is no evidence that Eastern tried to conceal the trust agreement, or that Eastern did not consider the trust agreement to be relevant to the Plan.

Plaintiffs also argue that incorporation of the trust agreement would be inconsistent with the regulations found in 29 C.F.R.

§ 2618. However, there is no language in those regulations requiring that the terms of a benefit plan be contained in a single document. Although 29 U.S.C. § 1102(a)(1) requires that an employee benefit plan be established and maintained pursuant to a written instrument, there is no requirement that the written instrument be one all-inclusive document. *Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans*, 607 F. Supp. 196, 207 (W.D. N.Y. 1984); *Myron v. Trust Co. Bank Long Term Disability Benefit Plan*, 522 F. Supp. 511 (1981).

In short, the court concludes that there is no material evidence which would indicate that the parties did not intend for the trust agreement to be considered a part of the Plan.

Plaintiffs advance other arguments as to why it would be contrary to ERISA to give effect to the reversion clause in the trust agreement. Plaintiffs rely on *Bryant v. Int'l Fruit Products Co., Inc.*, 793 F.2d 118 (6th Cir. 1986), in which the Sixth Circuit held under the circumstances of that case that an amendment to the pension plan which permitted reversion of surplus to the employer was invalid. However, the court in Bryant also noted, *Id.* at 123, that each case involving this issue "is controlled by the language of the documents creating the particular plan involved." Where the plan provides for recoupment by the employer, reversion is permissible. *Int'l Union, United Automobile Aerospace & Agric. Implement Workers v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984). In *Bryant*, the plan contained language which specifically prohibited reversion to the employer as well as any amendment of the plan to allow for reversion. No such language is found in the Plan, the trust agreement or the collective bargaining agreement in this case. Further, the trust agreement expressly permitted reversion of surplus assets to Eastern during the entire period the Plan was in effect. Until 1978, Eastern was permitted to unilaterally amend the plan, and the reversion language was in

place long before then. The case of *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985) is likewise distinguishable. In *Delgrosso* the plan specifically prohibited reversion and did not give the employer the right to amend the plan.

Plaintiffs argue that the other clauses in the Plan prohibit recoupment of the surplus by Eastern. Plaintiffs note Section 18.1 of the Plan, which provides that the trust funds shall be "held in trust by the Trustee for the exclusive benefit of the Members or their Beneficiaries under the plan who may, in accordance with the terms of the Plan and such Agreement of Trust, be entitled to participation thereunder." Section 18.2 provides:

> It shall be impossible under any circumstances at any time prior to the satisfaction of all liabilities with respect to Members and their Beneficiaries for any part of the corpus or income of the Trust Fund to be used for or diverted to purposes other than the exclusive benefit of the Members of the Plan and their Beneficiaries and defraying the reasonable expenses of administering the Plan.

The above sections incorporate the language of 29 U.S.C. § 1103(c)(1), which provides:

> Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 as in effect on January 1, 1991) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to

> participants in the plan and their beneficiaries and defraying expenses of administering the plan.

An exception to this "exclusive benefit" rule is created by § 1344(d)(1), which permits reversion of residual assets to the employer. *Wilson v. Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). A plan provision which merely paraphrases ERISA's "exclusive benefit" rule will not necessarily preclude the application of another plan term which allows for recoupment of surplus by the employer. *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983). The "exclusive benefit" rule is designed to protect against diminution or loss of anticipated, defined benefits. *Id.* at 260.

Here, the funds were held for the exclusive benefit of the employees insofar as their participation was "in accordance with the terms of the Plan and such Agreement of Trust." Plan, Section 18.1. Section 1.2 of the Plan provides:

> The purpose of the Plan is to provide retirement benefits for the eligible hourly-rated employees of the Company's Pattin Manufacturing Company Division at its Marietta, Ohio plant and their beneficiaries. To provide such benefits, the Company proposes to make the contributions provided for hereunder. Such contributions and any income derived therefrom shall be for the exclusive benefit of Pattin Manufacturing Company Division Marietta, Ohio, employees and their beneficiaries and shall not be used for, or diverted to, any other purpose.

Appendix B

The above language is limited by Section 10.1, which governs contributions by the company. The contributions referred to are those "required to fund the costs of pension and other benefits provided by the Plan" in "such sums as are required, in accordance with sound actuarial practices acceptable to the Internal Revenue Service, to fund the total cost of benefits provided by the Plan for the Members." *Id.* The Plan also sets forth definite pension and other retirement benefits to which participants are entitled. Thus, reading the Plan as a whole, *see Wilson*, 819 F.2d at 465, the "funds" which are to be held for the exclusive benefit of the participants are those funds necessary for the payment of the pension benefits set forth in the Plan, since the only purpose of the contributions to the fund is to finance the cost of benefits provided by the Plan. Residual assets are assets in excess of those necessary to satisfy defined benefit obligations, and need not be considered a part of the fund for the exclusive benefit of members. *Wilson*, 819 F.2d at 465; *In re C. D. Moyer Company Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977).

Plaintiffs also argue that Section 17.3 of the Plan prohibits reversion. That section provides:

> Upon termination or partial termination of the Plan, the rights of all Employees to benefits accrued to the date of such termination or partial termination to the extent then funded . . . shall be nonforfeitable, and upon the occurrence of such event, the assets of the fund shall be allocated among the Members and their Beneficiaries in accordance with Section 4044(a) of ERISA . . .

This section reflects the requirements of 29 U.S.C. § 1344(a).

However, § 1344(a) does not create any new or independent right to benefits, but simply provides that participants are entitled to accrued benefits only in accordance with the terms of the plan. *Mead Corp. v. B. E. Tilley,* 490 U.S. 714 (1989); *Morales v. Pan American Life Ins. Co.,* 914 F.2d 83 (5th Cir. 1990). Section 17.3 provides that upon termination, employees are entitled to "benefits accrued." The amount and type of benefits are defined throughout the Plan, and there is no provision to the effect that "benefits accrued" includes residual assets remaining after the liability for the retirement benefits specified in the Plan has been satisfied in accordance with the order of priority established by § 1344(a).

Plaintiffs further assert that the Eastern Plan was a defined contribution plan rather than a defined benefit plan, and that therefore § 1344(d)(1) does not apply. A "defined contribution plan" or "individual account plan" is a pension plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, including any income, expenses, gains, losses or forfeiture which may be allocated to the participant's account. 29 U.S.C. § 1002(34). A "defined benefit plan" is a pension plan other than an individual account plan. 29 U.S.C. § 1002(35). In order for a plan to be a defined contribution plan, the plan must establish a separate account for the participant, and the benefits must be based solely upon the level of funds in that account. *Matter of Defoe Shipbuilding Co.,* 639 F.2d 311 (6th Cir. 1981). Where the plan provides for benefits based upon a formula which is independent of the level of funding, it is not a defined contribution plan. *Id.* at 313.

Plaintiffs argue that the Eastern plan is a defined contribution plan because under the collective bargaining agreement, the amount of Eastern's contributions to the fund was established by the formula of a fixed monetary rate times a fixed number of

working hours times the average number of employees. However, the use of such a formula does not automatically establish a defined contribution plan. *Defoe Shipbuilding*, 639 F.2d at 313. The amount of benefits in the Plan here was determined by a formula independent of funding, and the Plan did not create individual employee accounts. For example, normal retirement benefits were calculated by multiplying the number of years of participation in the plan times a dollar amount set forth in the plan to arrive at an annual benefit. Plan, Section 3.2. Under Article 10 of the Plan, funding was solely by means of employer contributions, and no employee contributions were required or permitted. Plan, Section 10.3. The Plan in the present case does not satisfy the criteria for a "defined contribution" plan, and is therefore a "defined benefit" plan.

Plaintiffs further argue that the amount of contributions made to the Plan was a matter for collective bargaining, and therefore a recovery of surplus could not be unilaterally changed by Eastern. Plaintiffs cite *Professional Admin. Ltd. v. Kopper-Glow Fuel, Inc.*, 819 F.2d 639 (6th Cir. 1987), where the court held that plan trustees could not unilaterally increase the amount of contribution required from an employer. In contrast, the present case involves a situation where the employer has agreed to fund certain defined pension benefits through a trust agreement that provides that upon termination of the plan, any surplus beyond the amount required to fully fund those benefits would be returned to the employer.

Here, the Plan and trust agreement were in existence before the first collective bargaining agreement between Eastern and the union. The record reflects that provisions of the Plan were occasionally addressed during labor negotiations and that various amendments to the Plan were agreed upon. Appendix C to the 1974 collective bargaining agreement states that the "Company agrees

to continue in effect for its employees, the present Pension program as placed in effect January 1, 1957, and amended November 4, 1975." (Defendants' Reply Ex. 20, Req. Admissions No. 44). This agreement refers to pension "program," not "plan," suggesting that the union agreed to accept the entire pension scheme then in place, not just the Plan. However, even assuming that the reversion of surplus was never specifically addressed in the collective bargaining process, the evidence shows that the union and employees were advised of the existence and significance of the trust agreement, and could have negotiated for a specific provision for distribution of residual assets to the employees, yet the union never contested the reversion clause in the trust agreement. Under these circumstances, giving effect to the reversion clause would not contravene the federal labor policy favoring negotiation.

Plaintiffs further argue that the surplus in the trust fund was not due to actuarial error, but rather to the schedule of contributions established in the collective bargaining agreement. While paragraph eleven of the original trust agreement refers to surplus due to erroneous actuarial computation, Section 12.2(d)(i) of the 1975 trust agreement provides for the return of "residual assets" remaining after Plan liabilities have been satisfied. Thus, under the 1975 trust agreement, Eastern is not required to establish that the surplus was due to actuarial error. Section 1344(d)(1) does not specifically require that the residual assets be due to actuarial error.

In any event, authorities indicate that the surplus remaining after the purchase of annuities may be considered surplus due to actuarial error. In *Dyneer Corp.*, 747 F.2d at 337, the Sixth Circuit applied the Internal Revenue Service's definition of actuarial error, which provides that when pension liabilities are discharged through the purchase of insurance contracts, "the remaining assets

may be considered surplus arising from actuarial error" (quoting Rev. Rul. 83-52, 1983-13 C.B. 87). The surplus funds here meet that definition.

Even assuming that proof of actuarial error is required, the evidence in the record indicates that actuarial error is the cause of the overfunding here. Contributions are required under Section 10.1 in "such sums as are required, in accordance with sound actuarial practices." Mr. Toth, who worked in the Steelworkers Pension, Insurance and Unemployment Benefit Department, testified in his deposition that the union had employed the services of an actuary, and he referred to actuarial charts in a 1978 letter to counsel for Eastern which he indicated during his deposition as being "boilerplate" from a union agreement. (Toth Dep. pp. 19-21; Dep. Ex. 8). Mr. Toth further states in his letter that "we are not opposed to using the company's actuarial equivalents" and requests "a copy of the company's tables in order for our actuary to check out their reasonableness." He also suggests making the actuarial tables a part of the plan. (Dep. Ex. 8). Thus, the evidence suggests that the formula for contributions in the collective bargaining agreement was arrived at using actuarial data, and plaintiffs have submitted no evidence to the contrary.

Plaintiffs also assert, as a matter of policy, that to allow Eastern to recover the surplus would result in Eastern receiving a windfall. Even characterizing it as a windfall, it is one authorized by statute if the requirements of § 1344(d)(1) have been met. The concept of surplus codified in the statute is not new, but rather stems from the common law of trusts, which employs the term to describe any assets remaining in the trust after its purpose has been fulfilled. *Wilson*, 819 F.2d at 464. Under common law, a resulting trust in the surplus for the benefit of the creator of the trust arises by operation of law unless a contrary intent was manifested. *Id.*, citing

Restatement (Second) of Trusts 430 (1959). Defendants argue that under the circumstances of this case, plaintiffs would receive a windfall if they prevail.

The Sixth Circuit noted in *dicta* in *Bryant*, 793 F.2d at 123-24, that its decision precluding the recovery of surplus by the employer would not result in a windfall for the employees, and that an award of surplus to the employer would have been a windfall for the employer. At the time *Bryant* was decided, there was no income tax on the reversion of pension fund assets to the employer, although the court noted that a ten percent excise tax had been proposed in 1986. *Id.* Under the present version of 26 U.S.C. § 4980(d), a fifty percent tax is imposed on any employer reversion from a qualified plan unless the employer establishes a replacement plan or amends the plan to provide for increased benefits. Thus, at this point an employer recouping surplus will not receive a windfall due to the tax laws.

Additionally, it has been noted that "participants benefit more from a policy that encourages employers to fund pension plans generously than from a policy that entitles plan participants to surplus assets and thereby discourages employers from potentially excessive funding." *Eager v. Savannah Foods & Industries, Inc.*, 605 F. Supp. 415, 420 (N.D. Ala. 1984). Plaintiffs, "in the absence of an agreement to the contrary, have no right to a windfall resulting from an employer's overly generous contributions to the plan." *Washington-Baltimore Newspaper Guild*, 555 F. Supp. at 261.

In summary, the court finds that neither § 1344(d) nor public policy precludes the recovery of surplus assets in this case. The court concludes from the evidence that the trust agreement should be considered a part of the Plan for purposes of § 1344(d), and that

no genuine issue of material fact has been demonstrated which would preclude this result. The trust agreement establishes defendants' right to recover the surplus, and defendants' motion for summary judgment as to Counts One and Two is well taken.

Defendants also assert that they are entitled to summary judgment on Count Three of the amended complaint, which alleges a breach of fiduciary duty on the part of Eastern under 29 U.S.C. § 1104(a). It is alleged in Count Three that Eastern breached a fiduciary duty owed to Plan participants by not using the surplus in the trust fund to increase pension benefits. Defendants argue that Eastern was acting as an employer, not a fiduciary, in terminating the Plan, and that therefore Eastern cannot be held liable under Count Three.

An employer does not necessarily act in the role of fiduciary with respect to all actions taken in regard to an employee benefit plan. *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988). In making the decision to terminate a benefit plan, an employer acts as an employer, not as a fiduciary. *Id.* Eastern would not be liable for breach of fiduciary duty for its decision to terminate the Plan. However, Eastern would still be responsible, in the event of termination, for ensuring that any liability for benefits due to participants was discharged in accordance with the terms of the Plan.

Under 29 U.S.C. § 1104(a), a fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" for the exclusive purpose of providing benefits to participants and beneficiaries "in accordance with the documents and instruments governing the plan." As discussed above, the Plan in this case, incorporating the related trust agreement, provides for the recoupment of residual assets by

Eastern, not for the distribution of those assets to participants. Therefore, Eastern's recoupment of those assets is "in accordance with the documents and instruments governing the plan," and Eastern did not breach its fiduciary duties by failing to distribute those assets as an increase in pension benefits. Further, Eastern did not breach any fiduciary duty owed to participants when it included the recoupment provision in the trust agreement. At the time the recoupment provision was included in the trust agreement, Eastern had the authority under the Plan to establish the terms of the plan and the trust agreement, and was not precluded by any other terms of the Plan, trust agreement or collective bargaining agreement from providing for recoupment of surplus assets by Eastern. Defendants are entitled to summary judgment on Count Three.

In Count Four, plaintiffs assert a claim of promissory estoppel. Plaintiffs allege that Eastern made representations in the Summary Plan Description and otherwise to the effect that surplus assets would be distributed to the participants. To the extent that plaintiffs' claim is based upon state law, it is preempted by ERISA under 29 U.S.C. § 1144. *See e.g. Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987); *Defalu v. B. F. Goodrich Co.,* 871 F.2d 1290 (5th Cir. 1989). Courts have held that a trustee of a plan may not bind the fund through estoppel to make payments not required under the plan. *Hansen v. Western Greyhound Retirement Plan,* 859 F.2d 779 (9th Cir. 1988); *Moore v. Provident Life & Accident Ins. Co.,* 786 F.2d 922 (9th Cir. 1986); *Chambless v. Masters, Mates & Pilots Pension Plan,* 772 F.2d 1032 (2d Cir. 1985). Courts have also declined the invitation to expand ERISA's exclusive remedial scheme through the mechanism of developing a federal common law of ERISA. *See e.g. Morales,* 914 F.2d at 87.

In *Black v. TIC Investment Corp.,* 900 F.2d 112 (7th Cir. 1990),

cited by plaintiffs, the court recognized an estoppel claim but confined its holding to unfunded employee benefit plans and specifically excluded pension plans from the scope of its decision. Thus, it is distinguishable.

Plaintiffs also rely on *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134 (6th Cir. 1988). *Edwards* involved a situation where information in the plan summary conflicted with provisions in the actual plan, and plaintiffs relied on the plan summary, which was inaccurate and therefore violated 29 U.S.C. § 1022. The court in *Edwards* found that the plan fiduciaries were bound by the statements in the plan summary and that the decision to deny benefits was arbitrary and capricious in light of the summary plan language. *Id.* at 136-137. However, *Edwards* is not analogous to the present case. Plaintiffs have pointed to no language in the plan summary which is inaccurate or which would constitute a representation that they would be entitled to any surplus remaining after the full funding of pension benefits. In fact, the summary plan description states that "No part of the fund can be diverted or used for any purpose except for the exclusive benefit of Members *except where a contribution was* made by mistake . . ." (Emphasis supplied). (Defendants' Motion Ex. 2, p. 2). Although plaintiffs argue that this language refers to the recoupment provisions of 29 U.S.C. § 1103(c)(2)(i), which allows for the return of erroneously made contributions within one year after the payment of the contributions, the summary plan description, which constitutes the language upon which plaintiffs allegedly relied, contains no such limitation.

Even if this court were to find that plaintiffs may assert an ERISA estoppel claim, plaintiffs have produced no evidence to support such a claim. There is no evidence of representations in the summary plan description, the Plan itself or from other sources

upon which plaintiffs could have reasonably based the conclusion that the surplus in the trust fund would be distributed to them upon termination of the Plan. Defendants are entitled to summary judgment on Count Four.

In Count Five, plaintiffs allege that Eastern is liable under 29 U.S.C. § 1021(a) and § 1132(c)(3) due to the failure of the summary plan description to state that the trust agreement provided for the reversion of surplus. Plaintiffs have not stated a claim against Eastern under § 1132(c), since that section requires that a request for information be made to the administrator to which the administrator refuses a reply. *First Atlantic Leasing Corp. v. Tracey*, 738 F. Supp. 863 (D.N.J. 1990). Plaintiffs have not alleged in Count Five that a request for information was not honored by Eastern, nor have they produced any evidence to that effect.

Section 1021(a) provides that a summary plan description containing the information specified in 29 U.S C. § 1022(b) must be furnished to plan participants. The list of information in § 1022(b) does not specifically include the details of plan termination. While § 1022(b) may require the inclusion of information concerning plan termination in the plan summary where that information bears upon benefits payable under the terms of the plan, such information is not essential where, as here, the termination provision at issue has no impact on pension benefits to which the participants are entitled under the terms of the Plan. The summary plan description in the present case did inform participants that no funds could be diverted "except where a contribution was made by mistake..." (Defendants' Motion Ex. 2, p. 2), thereby alerting them to the possibility that parts of the fund attributable to actuarial error would be recovered by Eastern.

Further, plaintiffs must show a substantial lack of compliance

with ERISA's reporting and disclosure requirements, with resulting substantial harm to the employees, before a nondisclosure violation of § 1021(a) is subject to redress as arbitrary and capricious behavior. *See Blau v. DelMonte Corp.*, 748 F.2d 1348 (9th Cir. 1984). Mere technical noncompliance with no showing of substantial harm or egregious behavior on the part of the employer does not entitle plaintiffs to relief. *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517 (8th Cir. 1988).

Here, the plaintiffs were informed in the summary plan that contributions made by mistake might be diverted. Unlike *Blau*, there is no evidence, despite plaintiffs' bare, unsupported allegations to the contrary, that defendants attempted to hide the terms of the trust agreement from the employees. Rather, as noted previously, the Plan and trust agreement were available for inspection by the employees. The Plan makes repeated references to the trust and trust agreement, and those references were such as to reasonably alert the employees that the management and distribution of Plan assets was governed in part by the trust agreement. The court finds that no evidence has been produced which would create a genuine issue of material fact on the issue of whether defendants acted arbitrarily and capriciously in the reporting of Plan provisions. There has been substantial compliance with § 1021(a) and defendants are entitled to summary judgment on Count Five.

Count Six alleges that the collective bargaining agreement does not permit Eastern to recapture the surplus, and therefore, such an act would violate the collective bargaining agreement and 29 U.S.C. § 185. Count Seven alleges that since the recoupment by Eastern of the surplus would violate the collective bargaining agreement, it would also violate § 1344(d)(1)(B).

Plaintiffs have produced no evidence of any clause in the

collective bargaining agreement which prohibits the recovery of surplus by Eastern, or which provides for the distribution of surplus to the plaintiffs. Since there is no provision in the collective bargaining agreement which would preclude Eastern from recovering the surplus, Eastern would not violate the terms of the collective bargaining agreement in recovering the surplus, nor has any violation of § 185 been established. See *Gavie v. Stroh Brewery Co.*, 668 F. Supp. 608, 613 (E.D. Mich. 1987) (breach of a contractual duty contained in the collective bargaining agreement required for a § 185 claim). The fact that plaintiffs now feel that a specific provision permitting distribution of surplus to them should have been included in the collective bargaining agreement is not sufficient to create a contractual obligation on the part of Eastern. Plaintiffs had the option to negotiate for a specific provision to that effect, yet did not do so.

The fact that the collective bargaining agreement does not specifically refer to the trust agreement and termination provisions or provide for recoupment of the surplus by Eastern does not preclude Eastern from proceeding under the terms of the trust agreement, as there is no provision in the collective bargaining agreement which would preclude it from doing so. However, even if it is assumed that enforcement of the trust provision was dependent upon the acceptance of the trust by the parties through the collective bargaining agreement, the evidence before the court suggests that this was the case here. As noted above, Appendix C to the 1974 collective bargaining agreement states that Eastern agreed to continue the present "Pension program." (Defendants' Reply Ex. 20, Req. Admissions No. 44). The present "program" included not only the Plan, but also the trust agreement. The Plan authorizes Eastern as plan administrator to enter into a trust agreement. The trust agreement was referred to several times in the Plan, including a reference in Section 18.1 that employees would

be entitled to participate "in accordance with the terms of the Plan and such Agreement of Trust." No evidence has been produced to indicate that the union or plaintiffs ever expressed an intent during negotiations or otherwise that the surplus be distributed to plaintiffs, nor has any evidence been offered which would establish a violation of the collective bargaining agreement, and no genuine issue of material fact exists as to Counts Six and Seven.

In accordance with the foregoing, defendants' motion for summary judgment is granted, and plaintiffs' cross-motion for summary judgment is denied. The clerk of courts shall enter judgment for defendants.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: August 20, 1991

FILED
MAR 22 1993
CLERK

No. 92-1169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE EASTERN COMPANY, THE EASTERN CO. PENSION PLAN FOR HOURLY-RATED EMPLOYEES OF THE PATTIN MANUFACTURING COMPANY DIVISION, AND BANK OF BOSTON, CONNECTICUT (FORMERLY THE COLONIAL BANK),

Petitioners,

v.

CARL RINARD, *et al.*, AND A CLASS OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1169

THE EASTERN COMPANY, THE EASTERN CO. PENSION PLAN FOR HOURLY-RATED EMPLOYEES OF THE PATTIN MANUFACTURING COMPANY DIVISION, AND BANK OF BOSTON, CONNECTICUT (FORMERLY THE COLONIAL BANK),

Petitioners,

v.

CARL RINARD, *et al.*, AND A CLASS OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

This case involves nothing more than an application, to a unique set of facts, of what petitioners themselves describe as the "settled contract-based legal doctrine" of "incorporation by reference." Petition at 14. The court below found that the parties to a collectively-bargained pension plan agreement, who had revised the agreement to eliminate a provision that would have allowed the employer to claim a reversion of surplus assets upon plan

termination, did not intend to incorporate by reference into that agreement a provision allowing reversion that was contained in a separate trust agreement to which the union was not a party. That interpretation of the contracting parties' intent implicates no important or recurring issue of federal law, and no issue of federal law on which the circuit courts of appeals have adopted conflicting positions. *Certiorari* should therefore be denied.

ARGUMENT

I.

The Employee Retirement Income Security Act of 1974 ("ERISA") prohibits the reversion of pension plan assets to an employer, even upon plan termination, except where "*the plan* provides for such a distribution." 29 U.S.C. § 1344(d)(1)(C) (emphasis added).

The plan involved in this case was set forth in an agreement between the petitioner Company and the Union that represented the respondent employees. The agreement was entitled "The Eastern Company Pension Plan for Hourly-Rated Employees of the Pattin Manufacturing Company Division" ("Pension Plan Agreement"). The Company and the Union expressly agreed that the Pension Plan Agreement constituted "the Plan." *See* Pension Plan Agreement, § 2.24 ("*Plan* shall mean the Pension Plan set forth herein and subsequent amendments hereto.") (Jt. App. 36); *id.* at p. 1 (in the Pension Plan Agreement, the Company and the Union "have amended and restated the retirement plan . . . on the terms and conditions hereinafter set forth") (Jt. App. 27).[1]

Prior to the enactment of ERISA, the Pension Plan Agreement contained a provision stating that upon termination of the Plan, "any funds not required to satisfy all liabilities of the Plan for pensions because of errone-

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[1] References to "Jt. App." are to the Joint Appendix filed in the Court of Appeals. The appendix to the Petition for Certiorari is cited as "Pet. App."

ous actuarial computations shall be returned to the Company." Pet. App. 13a. However, shortly after Congress enacted ERISA—with its prohibition of reversion except where "the plan [so] provides"—*the contracting parties eliminated that reversion provision from the Pension Plan Agreement.* As a consequence, the Pension Plan Agreement, as it stood at the time of plan termination in 1987, did not contain *any* provision allowing a reversion of assets to the Company upon plan termination. To the contrary, the only parties identified in the Plan as eligible for a distribution of assets upon plan termination were the *Members* and *Beneficiaries* of the Plan. Pension Plan Agreement, § 17.3 (Jt. App. 88).

The Company distributed Summary Plan Descriptions ("SPDs") to plan participants in accordance with section 102 of ERISA, 29 U.S.C. § 1022, which requires plan sponsors to provide SPDs "written in a manner calculated to be understood by the average plan participant and . . . sufficiently accurate and comprehensive to reasonably apprise such participants of their rights and obligations under the plans." On the subject of the distribution of assets upon plan termination, the SPDs stated:

> In the event the Plan discontinues, the assets of the Plan will be used to provide benefits to Members in the order of the priority categories specified in the Plan document. [Jt. App. 290]

The SPDs also stated that "[n]o part of the Fund can be diverted or used for any purpose *except for the exclusive benefit of Members except where a contribution was made by mistake or found not deductible on a Federal Income Tax return.*" Jt. App. 283 (emphasis added). Thus, neither in discussing plan termination nor in discussing the use of funds did the SPDs suggest that plan assets could revert to the Company upon plan termination. Nor was there any suggestion to that effect elsewhere in the SPDs.

When the Plan was terminated in 1987, the assets of the Plan exceeded what was necessary to provide the benefits defined in the Pension Plan Agrement.[2] The Company argued in the courts below that it had a right to the surplus assets, by virtue of a provision contained *not* in the Pension Plan Agreement or in any other agreement between the Company and the Union, but in a separate Trust Agreement between the Company and the Colonial Bank and Trust Company ("the Bank"), which served as Trustee to the Plan. The Trust Agreement was never the subject of negotiations between the Company and the Union, and the Union was not a party to that Agreement. *See* Pet. App. 5a n.1.

The Pension Plan Agreement—which the parties expressly agreed constituted "the Plan," *see* supra at 2—contained no language stating that the Trust Agreement, or any provision thereof, was to be deemed part of "the Plan." In fact, the Pension Plan Agreement contained only two general references to the Trust Agreement, and those references, as the Court of Appeals, held, constituted "little more than a recognition of the existence of a trust and a restatement of the duty of the employer to segregate plan assets." Pet. App. 8a.[3]

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[2] The Pension Plan Agreement defined certain benefits participants would receive upon retirement, and it provided that the Company would make contributions to a Trust Fund so as to fund the benefits. Pension Plan Agreement, § 10.1 (Jt. App. 58). In practice, the Company and the Union entered into a series of agreements that required the Company to make irrevocable contributions to the Trust Fund in specified amounts. *See* Jt. App. 264-269. For example, a 1975 agreement required contributions by the Company in the amount of ten cents per hour per employee.

[3] Section 18.1 of the Pension Plan Agreement recited that "[i]n order to implement the Plan, the Company has entered into an Agreement of Trust to the end that such funds as may be irrevocably contributed from time to time for the payment of all or any part of the benefits under the Plan shall be segregated from the Company's own assets and held in trust by the Trustee for the exclusive benefit of the Members or their Beneficiaries under the

On these facts, the Court of Appeals' conclusion that "the plan" did not provide for reversion, was both clearly correct and unremarkable.

II.

A. Petitioners acknowledge that their quarrel with the decision below centers on how the Court of Appeals applied, to the particular facts presented here, the "settled contract-based legal doctrine" of "incorporation by reference." Petition at 14. Petitioners argue that the court below erred by requiring greater "specificity" for incorporation by reference than a proper application of the common law test would require. *Id.* at 21-24. But the Court of Appeals did not purport to depart from the analysis that would apply under common law. *See* Pet. App. 8a n.3. And it is petitioners, not the court below, who misstate the common law: at common law the facts set forth above plainly would not support—much less compel—a finding that the reversion provision of the Trust Agreement was incorporated by reference into the Pension Plan Agreement.[4]

Plan who may, in accordance with the terms of the Plan and such Agreement of Trust, be entitled to participation thereunder." Jt. App. 90. Section 2.30, in turn, defined the term "Trust" to mean "the legal entity resulting from the Trust Agreement between the Company and the Trustee who receives the Company contributions, and holds, invests and disburses funds to or for the benefit of Members and their Beneficiaries." Jt. App. 38.

In addition to those two references to the Trust *Agreement*, the Pension Plan Agreement referred at several points to the existence of *a trust*. The district court placed great emphasis on these "many references to the trust in the Plan." Pet. App. 15a. But the mere mention of the fact that pension funds are held in trust certainly does not constitute an incorporation by reference of every provision that may be contained in a separate trust *agreement*. *See infra* at 5-7 & note 4.

[4] Petitioners suggest that at common law the mere mention of one document in another would suffice for incorporation by reference. *See* Petition at 21-23. As the Court of Appeals stated, that

Even if that point could fairly be questioned, this Court should not grant *certiorari* merely to review an application of "settled contract-based legal doctrine" to the particular facts of this case. Nor should the Court grant *certiorari* to expound on "[j]ust how much 'specificity' is possible or desirable before the doctrine of incorporation by reference is to be applied to key pension documents like a trust agreement." Petition at 14. As petitioners themselves acknowledge, this is not an area that lends itself to "any 'wooden' rule mechanically applied." *Id.* at 22.

While acknowledging that wooden rules should not be applied in these circumstances, petitioners suggest that because of "the importance of the trust arrangement" under ERISA, Petition at 21, all provisions of trust agreements should routinely be understood to be incorporated by reference into pension agreements. That is a *non sequitur*: the fact that ERISA requires generally that pension plan assets be held in trust and gives trustees an "important role," Petition at 19-21, does not suggest that every provision a company and a bank may choose to place in their trust agreement should be considered part of the governing pension plan—particularly where, as here, the plan, but not the trust agreement, is the product of collective bargaining and agreement between a company and a union. The cases petitioners cite on this point, *see id.* at 14, 19-21, stand for nothing more

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is not the common law. *See* Pet. App. 8a n.3. In this connection, petitioners' reliance on this Court's decision in *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264 (1916), is misplaced. In that case, the Court held that a general contract, although mentioned in a subcontract, was *not* incorporated by reference therein. *Id.* at 277-78. Petitioners misrepresent the holding of *Guerini Stone* by omitting the final words of the sentence quoted at p. 21 of the Petition. The complete sentence reads: "[I]n the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement *only for the purpose specified.*" 240 U.S. at 277 (emphasis added).

than what the court below acknowledged, namely, that it is possible for a "plan" to consist of more than one document, *see* Pet. App. 6a n.2, and that provisions of a trust agreement may be incorporated by reference into a pension plan agreement *where the language of the documents, fairly construed, so provides. See* Pet. App. 8a & n.3.[5]

In this connection, the court below did not adopt any evidentiary "presumption" foreclosing proof in an individual case that the contracting parties intended to incorporate a trust agreement by reference into "the plan" for purposes of 29 U.S.C. § 1344(d)(1)(C). *See* Petition at 17. The court's reference to a "presumption" was no more than a recognition of the fact that ERISA generally prohibits reversion of assets to employers, subject only to certain specific exceptions, one of which is where "the plan [so] provides." *See* Pet. App. 7a. And, the court applied this "presumption" only to reach a result that would be compelled on the facts of this case under any reasonable standard, and one that the court expressly held would flow from common law principles wholly apart from any special requirements of ERISA. *See* Pet. App. 8a & n.3.

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[5] Petitioners consistently mischaracterize the cases they cite. *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), was not, as petitioners assert, a case in which this Court "proceeded on the premise" or "assum[ed]" that trust agreements are incorporated by reference into pension plans. *See* Petition at 14, 19. Rather, the employers in *Robbins* had *conceded* that their particular collective bargaining agreements incorporated the trust agreements. *Robbins v. Prosser's Moving and Storage*, 109 LRRM 3229, 3231 (8th Cir. 1982) (*per curiam*), *aff'd*, 700 F.2d 433 (8th Cir. 1983) (*en banc*), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins, supra.* Nor was *Santa Monica Culinary Welfare Fund v. Miramar Hotel Corp.*, 902 F.2d 1491 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2855 (1991), a case "incorporating a trust agreement by reference" into a pension plan agreement. *See* Petition at 20. Rather, in *Miramar* the trust agreement was enforced directly against the defendant employer who was "bound by its terms." 920 F.2d at 1494.

B. The decision below does not conflict with any other court of appeals' decision on any issue of federal law. The Ninth Circuit decision relied on by petitioners, *Schuck v. Gilmore Steel Corp.*, 784 F.2d 947 (9th Cir. 1986), did not purport to "resolve[]" either of the legal issues identified by petitioners. *See* Petition at 16; *see also id.* at 13. To the contrary, the *Schuck* court purported to do nothing more than interpret particular language in a particular pension plan agreement. That language differed in significant respects from the contract language at issue here, *compare* 784 F.2d at 951 *with supra* at 2-4 & note 3, and the circumstances surrounding the negotiation of that language were significantly different as well; in particular, there was no evidence in *Schuck*, as here, that the contracting parties had eliminated a reversion provision contained in prior versions of the pension plan agreement.

The Ninth Circuit interpreted the contract language at issue in *Schuck* as clearly putting plan participants on notice that a separate trust agreement would control termination of the plan. *See* 784 F.2d at 951 ("Any participants who read the Pension Agreement would have known another document would control termination of the plan."). Although that characterization may be open to question, the *Schuck* court predicated that characterization solely on the court's reading of the relevant contract language, and not on any principle of federal law that differs from the principles applied by the court below. Accordingly, there is no "conflict" between the Ninth and Sixth Circuits on any issue of federal law.[6]

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[6] The court below indicated that *Schuck* might be read to suggest that a pension plan agreement incorporates a trust agreement by reference whenever the pension plan agreement merely acknowledges "the existence of a trust and . . . the duty of the employer to segregate plan assets." Pet. App. 8a. Again, the *Schuck* court did not purport to lay down any such rule of law; and if *Schuck* were interpreted in that manner, the decision would plainly be a sport. No court has cited *Schuck* as precedent for how the doctrine of

Nor is the decision below in conflict with the "several other ERISA decisions" relied on by petitioners. Petition at 23; *see also id.* at 15-16. *Outzen v. FDIC ex rel. State Examiner of Banks*, 948 F.2d 1184 (10th Cir. 1991), gave effect to a reversion provision in the Plan document itself; there was no issue presented in *Outzen* concerning the incorporation by reference of a separate trust agreement. Similarly, the issue presented in both *IUE v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992) and *In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991), was whether the Plan document itself could be amended to provide for reversion.[7]

C. Finally, the decision below has no "public policy implications." *See* Petition at 14-16, 24-25.

The issue of whether a trust agreement provision authorizing reversion has been incorporated by reference into "the plan" for purposes of 29 U.S.C. § 1344(d)(1)(C) is not a recurring one. Nor should that be at all surprising: in light of the statutory language, any prudent employer would place a provision authorizing reversion in the Plan document itself or at least draft the Plan document to accomplish, under ordinary rules of contract interpretation, an incorporation by reference of another document containing such a reversion provision.[8] Because employers can readily draft their plan

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incorporation by reference should be applied in this or any other ERISA context.

[7] Petitioners simply misquote the decision in *IUE v. Murata* when they assert that the Third Circuit declared that "language purporting to prohibit reversion . . . must be quite explicit." Petition at 16. What the Third Circuit actually said was that "language purporting to prohibit *amendment to plan documents* to allow for reversion . . . must be quite explicit." 980 F.2d at 906 (emphasis added).

[8] Indeed, employers do not appear to have been experiencing great difficulty in providing for reversions under the terms of their

documents to secure an intended reversion right, the decision below creates no incentive for employers to be "less generous" in funding pension plans, *see* Petition at 15, for fear that they will not be able to claim a reversion.

CONCLUSION

For the reasons stated, the petition for *certiorari* should be denied.

Respectfully submitted,

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plans, as reflected by the large number of reversions that petitioners cite as having occurred from 1980-86. *See* Petition at 14 n.3.

Petitioners cite these reversion statistics to illustrate the "national economic significance" of plan terminations resulting in reversions. *See id.* at 14. But as used for this purpose, these reversion statistics are selective and misleading. Since 1986, Congress has sought to discourage employers from terminating pension plans in order to recover surplus assets by placing increasingly onerous excise taxes, as high as 50%, on any such assets recovered by the employer. *See* S. Bruce, *Pension Claims, Rights and Obligations* 659-61 (2d ed. 1993). These excise taxes, combined with changed economic conditions, have resulted in dramatically fewer reversions in recent years. In its 1992 Annual Report, the Pension Benefit Guaranty Corporation ("PBGC") reports that

> [p]lan terminations resulting in large reversions of surplus assets to employers fell to their lowest levels since PBGC first began recording such cases in 1980. For 1992, fewer than 10 plans were expected to terminate with reversions in excess of $1 million each, compared to fewer than 40 last year and the 582 plans that terminated in the peak year of 1985. Terminations in 1992 will have less than $20 million of total estimated reversions compared to reversions of about $70 million in 1991 and $6.1 billion in 1985. [1992 Annual Report at 5-6.]

